NO. 82-1205

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

DR. GRANVILLE M. SAWYER, ET AL.,
Petitioners

v.

IRANIAN STUDENT ASSOCIATION,
PEREYDOUN KIANI-ZEINABAD,
Individually And On Behalf Of All Others
Similarly Situated,
Respondents

Petition For Writ of Certiorari To The United States Court Of Appeal For The Fifth Circuit

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JIM MATTOX
Attorney General of Texas

C. ED DAVIS
Chief, State & County Affairs

LONNY F. ZWIENER
Assistant Attorney General

LAURA S. MARTIN
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys For Petitioners

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Petitioners, Dr. Granville M. Sawyer, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court ox Appeals for the Fifth Circuit entered on September 13, 1982, with Petitioners' timely Motion for Rehearing En Banc denied on October 12, 1982.

QUESTION PRESENTED FOR REVIEW

The principle question presented for review is: Whether the Court of Appeals correctly held that the Iranian Student Association and Pereydoun Kiani-Zeinabad, individually and on behalf of all others similarly situated, as plaintiffs, were "prevailing parties" for purposes of attorney's fees under 42 U.S.C. § 1988 when the state defendants were not allowed an opportunity to prove that the alleged constitutional violations were not true.

PARTIES TO THE PROCEEDINGS

In the District Court below, the Iranian Student Association and Pereydoun Kiani-Zeinabad, individually and on behalf of others similarly situated, as plaintiffs, brought suit against:

Dr. Granville M. Sawyer
President - Texas Southern University, individually and in his official capacity

George L. Allen
Ernest S. Sterling
Mrs. Naomi Cox Andrews
B. Dubois Brown
Milledge A. Hart, III
Rev. M. L. Price
Ronald B. Puritt
Richard Reyes
Judson W. Robinson, Jr., individually and as members of the Board of Regents of Texas Southern University

While many of the named defendants no longer serve in the capacities described, no defect as to parties is alleged by Petitioners since the State of Texas is the real party in interest.

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INDEX OF AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals for which review is sought is not reported. A copy of the opinion is, however, included in the Appendix to this Petition. The District Court opinion with findings of fact and conclusions of law is not reported but is included in the Appendix together with the District Court's judgment. The earlier opinion of the Fifth Circuit and its final order denying rehearing are both set out in the Appendix. The denial of rehearing is reported at _____F.2d _____.

JURISDICTION

The opinion of the Court of Appeals was entered on September 13, 1982. Petitioner's Petition for Rehearing En Banc, which was timely filed, was overruled by the Court of Appeals on October 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The free speech clause of the First Amendment and the Fourteenth Amendment to the United States Constitution are both involved in this cause.
The First Amendment provides in part:

> Congress shall make no law...abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law...

The Attorneys' Fees Act, 42 U.S.C.A. § 1988, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provisions of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

In the Fall of 1978, Dr. Granville Sawyer, then president of Texas Southern University, and with approval of the members of the board of regents of the University issued a memorandum banning all protest marches and demonstrations from the university's campus for an indefinite period of time. This action was taken in response to violently disruptive and potentially dangerous demonstrations on the campus which had involved Iranian students. Some 12 days after the ban was imposed, suit was filed by the Iranian Student Association and an individual Iranian student, individually and on behalf of others, attacking the ban as an unconstitutional infringement of their First and Fourteenth amendment rights under 42 U.S.C. §§ 1983, 1985 and 1986. The day after suit was filed, Dr. Sawyer issued a memorandum which rescinded the ban and which stated the University's positions on several issues of concern to the Iranian Student Association. These issues had been earlier presented to Dr. Sawyer in a conference with plaintiffs' attorneys. After the ban was lifted, all parties to the suit agreed the case was moot except as to the issue of attorneys' fees. After an informal hearing the District Court determined that plaintiffs were the "prevailing parties" in the context of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, and awarded attorneys' fees to them in the amount of $4,181.25. On appeal, the Court below vacated the judgment and remanded for a full evidentiary hearing on the prevailing party issue. *Iranian Students Association v. Sawyer,* 639 F.2d 1160 (5th Cir. 1981). After hearing was held the District Court again awarded attorneys' fees to the plaintiffs and the defendants appealed.

Affirming the District Court's judgment, the Court below held that the two requirements used to determine whether a party is a prevailing party within the meaning

of 42 U.S.C. § 1988 had been met. With regard to the required factual determination, the Court below held that the ban was lifted because the plaintiffs filed a lawsuit challenging the ban's imposition. With regard to the second requirement, a legal determination, the Court below held that because the plaintiffs' suit had presented significant constitutional claims, it was not a "frivolous" lawsuit. The Court below further found that the amount of attorney's fees awarded to plaintiffs by the District Court was properly determined within the court's discretion.

Petitioners admit that the decision of the Court below may be in accord with the law as announced by the Circuit. That holding, however, runs counter to logic, reason, fairness and due process, and violates the law as announced by this Court and the principles of federalism implicit in the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

In the case at bar, attorney's fees have been levied against the State of Texas without any decision as to whether the State acted improperly or illegally.

The Court below held that a civil rights plaintiff is a "prevailing party" under 42 U.S.C. § 1988 where (1) some interlocutory relief has been achieved even if not legally proper, and (2) the case filed is not "frivolous." (Citing its prior decision in *Iranian Students Association v. Sawyer*, 639 F.2d 1160 (5th Cir. 1981). The court, however, issued its decision without any consideration as to whether the plaintiffs would prevail if the defendants were permitted to offer a legal defense of their actions.

The seriousness of the District Court's decision, as supported by the Court below, is of significance because liability for attorneys' fees inflicts severe financial

penalties. Exposure of any party to such penalties, when mootness deprives a party of a judicial determination of a lawsuit's meritoriousness, should result only from a clear authorization by Congress or, as stated by Justice Rehnquist, by settled precedent of this Court. *See Alioto v. Williams*, _____ U.S. _____, 101 S.Ct. 1723, 1724 (1981). Furthermore, the offensiveness of holding the State of Texas subject to a fee award of $21,975.10 is even more apparent when the record of this case is examined.

In this case the Petitioners repeatedly suggested, entreated and finally demanded that the District Court allow them the opportunity to offer evidence that Iranian demonstrations were properly banned because of the clear and present danger of violence and disruption of University activities. In support of this defense, they attempted to show that the continuing incidents involving Iranian students where the students intentionally disrupted University classes; blocked traffic on the campus; threatened violence to visitors on the campus; and finally caused so serious a disturbance that the City of Houston riot squad had to be called to campus to disperse students and restore security, clearly demonstrated that imposition of the ban on campus demonstrations was constitutionally proper. The District Court, however, refused to allow Petitioners to present a legal defense for their actions — it refused to allow a showing of a requisite state interest which would support the State's impingement of the plainiffs' alleged First Amendment rights.

The decision of the Court below — that a prevailing party is one who achieves an interlocutory victory combined with a non-frivolous cause of action — is in conflict with the reasoning of this Court in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), wherein the Court stated, at page 757, that attorney's fees are only proper where a party has *established* "his entitlement to some relief on

the merits of his claims," and only "when a party has prevailed on the merits of at least some of his claims."

In the case at bar, there has been *no* decision on the merits — was the ban on demonstrations proper in view of the past experiences of violence and disruption and the continued threat of violence and disruption? As previously stated, Petitioners have never had the opportunity to answer the question. Ergo, no decision has ever been reached on the merits of the ban.[1]

It should be further noted that all the authorities cited by the Court below as support for its finding of a "non-frivolous" suit show that some judicial determination must be made of whether or not a defendant's behavior is actually unconstitutional.[2] The decision of the Court below therefore departs from the requirement that an underlying constitutional violation must be proved and instead only requires that some temporary relief be

1. The only part of the Court below's decision that is felt to be correct is the discussion concerning the jurisdiction of the ban under the Texas Education Code. The Code cannot justify the ban, but the clear and present danger of disruption and violence can legally support the ban against demonstrations if proof of this danger could only be offered.

2. The case of *Riddell v. National Democratic Party*, 624 F.2d 539 (5th Cir. 1980) assumes that attorney's fees are proper to enforce legitimate Constitutional rights. The court entered a decision on the merits of the civil rights claim which was presented in the case. In the case at bar, the Court below did not.

In *Robinson v. Kimbrough*, 652 F.2d 458 (5th Cir. 1981), the Court below concluded that the lawsuit brought was a "significant catalyst in motivating the defendants to end their *unconstitutional behavior*" (652 F.2d at 466, emphasis supplied) before the court held that the plaintiff was entitled to attorney's fees. Clearly the Fifth Circuit requires some determination of a defendant's "unconstitutional behavior." *See Williams v. Leatherbury*, 612 F.2d 549 (5th Cir. 1982).

achieved and that a plaintiff plead a "non-frivolous" lawsuit. This holding is wrong and cannot substitute for proof of some actual civil rights denial. *See Hanrahan v. Hampton, supra.*

This Court should grant the Writ of Certiorari in this cause and hold that, even where a case is judged moot, proof of the case's merit (in the case at bar, a showing that the Petitioners actually violated the plaintiffs' constitutional rights) must be made before a plaintiff may subject a state defendant to attorney's fees under 42 U.S.C. § 1988.

ADDENDUM

The award of attorney's fees against Texas Southern University, without permitting it to present its defenses to the plaintiffs' constitutional claims, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution if the University can be considered to be a person.[3] Without regard, however, to whether the University is a person, "Our Federalism" constitutionally prohibits the federal government, by the enacting of 42 U.S.C. § 1988 and by judicial interpretation, from exacting money from the states without a showing of culpability. *Younger v. Harris,* 401 U.S. 37 (1971).

In the federal system the federal government must give due deference to the responsibilities of the states to keep the peace and provide public education. *See National League of Cities v. Usery,* 426 U.S. 833 (1976).

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3. Whether a university is a "person" within the parameters of the Fourteenth Amendment has never been completely resolved. *See Monell v. Soc. Serv. of New York,* 436 U.S. 658 (1978). However, it should be noted that there are ten defendants in the case at bar who have been sued in their "individual" capacities. Clearly the rights of these persons are protected by the Fourteenth Amendment.

Imposing substantial liabilities on a state without requiring a finding of fault offends the doctrine of "Our Federalism."[4]

CONCLUSION

For the foregoing reasons, a Writ of Certorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

C. ED DAVIS
Chief, State & County Affairs

LONNY F. ZWIENER
Assistant Attorney General

LAURA S. MARTIN
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Petitioners

4. As U.S.C. § 1988 has been construed by this Court, the statute is "appropriate" legislation for implementing the guarantees of the Fourteenth Amendment of the U.S. Constitution.

CERTIFICATE OF SERVICE

I, Laura S. Martin, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondents by depositing same in the United States Mail, certified, return receipt requested to the following attorneys of record for appellees: Mr. J. Patrick Wiseman, Nelson & Mallett, 3303 Main Street, Suite 300, Houston, Texas 77002; and Mr. Van Vamacka, 210-C Stratford, Houston, Texas 77006, on this the _____ day of January, 1983.

LAURA S. MARTIN